SUPREME COURT, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MARK STAFFORD ROBINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether "intent to defraud" the United States under 18 U.S.C. 545 requires proof of an intent to cause the government a loss of money or property, or requires proof only of the knowing submission of a false document.

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INTRODUCTION

The term "intent to defraud" in federal criminal statutes has been generally construed to mean an intent to deprive another of money or property by fraudulent means. *McNally v. United States*, 483 U.S. 350, 359 (1987). When the term "defraud" appears in statutes referring to defrauding the federal government, the precise meaning of the term varies according to the language and purpose of the particular statute. If the statute refers broadly to a proscription on conspiring to defraud the United States "in any manner or for any purpose", the term "defraud" can include the obstruction of a governmental function as well as an intended deprivation of money or property. *Hammerschmidt v. United States*, 265 U.S. 182, 185, 188 (1924). When the statute refers to a "claim" against the United States, "defraud" is limited to the intended deprivation of a property right; and, a misstatement to a government agency, without intended monetary loss to the United States, does not fall within the ambit of the statute's proscription. *United States v. Cohn*, 270 U.S. 339, 343 (1926). The decision in this case conflicts with the *Cohn* decision on an important issue of federal law, by assuming that with respect to the government, an "intent to defraud" requires only an intent to obstruct a government function. This Court's cases make clear that the meaning of "intent to defraud the United States" varies depending upon the purpose, history and language of the particular statute.

Just as the term "defraud" under this Court's jurisprudence has been held to have varying meanings depending upon the particular statute in which it appears, the phrase "intent to defraud" in a primary Customs statute, 18 U.S.C. 545, has divided the circuit courts of appeals as to its meaning. Three circuits, the Second, Seventh and now the Ninth, have held that "intent to defraud" requires merely proof of an intent to mislead or deceive U.S. Customs. Another circuit, the Third, has held that "intent to defraud" requires proof of an intent to cause a monetary loss to the United States.

18 U.S.C. 545 forbids, *inter alia*, knowingly and willfully, and with intent to defraud the United States, passing or attempting to pass

through the customhouse, any false, forged or fraudulent invoice or other document. This case directly raises the issue of whether "intent to defraud the United States" under this statute requires the prosecution to prove an intent to deprive the United States of revenue, or whether it may be satisfied upon a simple showing that the defendant knowingly filed a false invoice or document.

In *United States v. Menon*, 24 F.3d 550 (3rd Cir. 1994), the Court of Appeals for the Third Circuit held that intent to deprive the government of revenue is required for a conviction of §545. The *Menon* court reasoned that because of the history and language of the statute, and in light of this Court's decisions in *McNally, Cohn* and *Hammerschmidt*, the government is required to prove that the defendant acted with the intent to deprive the government of money or property. In this case, the Court of Appeals for the Ninth Circuit, citing decisions from the Seventh Circuit in *United States v. Kurfess*, 426 F.2d 1017 (7th Cir.1970), and the Second Circuit in *United States v. Borello*, 766 F.2d 46 (2nd Cir. 1985), held that the prosecution is not required to prove an intent to defraud the government of revenue. The Ninth Circuit held that the statute may be satisfied by proof of the knowing submission of a false invoice with the intent to deceive the government. The Ninth Circuit decision ignores the history of the statute and its enactment, important rules of statutory construction and the existence of other related statutes in the statutory scheme regulating the submission of Customs documents. In light of the conflict between this decision and that of the Third Circuit Court of Appeals on the same issue involving this important Customs statute, Petitioner respectfully requests the Court to grant this petition for a writ of certiorari.

OPINION IN THE COURT BELOW

The opinion of the Court of Appeals affirming the conviction of petitioner is officially reported at 147 F.3d 851. A copy of the opinion is attached as Appendix A. A copy of the unpublished memorandum resolving the balance of the appeal is attached as Appendix B.

STATEMENT OF JURISDICTION

On June 4, 1998, the Court of Appeals entered judgment affirming the conviction of petitioner in this case. On August 31, 1998, the Court of Appeals filed an order denying the petition for rehearing and rejecting the suggestion for rehearing en banc. This order is attached as Appendix C. The district court had jurisdiction under 18 U.S.C. 3231. The Court of Appeals exercised jurisdiction under 28 U.S.C. 1294(1). This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. 542 provides in relevant part:

> Entry of goods by means of false statements. Whoever enters or introduces or attempts to enter or introduce into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties ..... shall be fined for each offense under this title or imprisoned for not more than two years or both.

18 U.S.C. 545 provides in relevant part:

> "Whoever knowingly and willfully, with intent to defraud the United States .... makes out or passes, or attempts to make out or pass, through the customhouse any false, forged, or fraudulent invoice or other document or paper .... shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner Mark Robinson was charged in an indictment filed on June 20, 1995. [ECR 1-32.][1] Count One alleged a conspiracy in violation of 18 U.S.C. 371. [ECR 1-16.] Counts Two, Three and Four of the indictment charged that on three separate dates in 1990, Mr. Robinson and co-defendants Pecqueraux and Hirou "made out and passed, and attempted to make out and pass through the customhouse, false, forged and fraudulent invoices and other documents and papers" with intent to defraud the United States, in violation of 18 U.S.C. 545. [ECR 16-17.] These charges were made in connection with the importation of IBM computer "processor" cards. [ECR 16-17.] Other counts in the indictment related to counts Two, Three and Four. Counts Five, Six and Seven charged that IBM computer processor cards which had been brought into the United States with fraudulent invoices were received within the United States. [ECR 18-19.] Counts Eight through Forty alleged money laundering in violation of 18 U.S.C. §§ 1956 and 1957.[2] [ECR 19-24.] All the money laundering counts had as their predicates the violations of 18 U.S.C. 545 which were charged in Counts Two through Four. Thus,

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1 ECR refers to the Excerpt of Clerk's record filed with the Court of Appeals.

2 Other counts in the indictment charged unrelated matters as to which the defendant did not appeal or as to which he was acquitted.

if petitioner were not guilty of the predicate § 545 offenses, he could not validly have been convicted of the money laundering counts.

Mark Robinson and Bradley Hirou were co-owners of Fusion International Trading, Incorporated. ("Fusion") [RT 8-66.][3] Mr. Robinson was the president and majority owner. In 1990, Hirou contacted Stephan Pecqueraux, the majority owner of High Tech Trading ("HTT") a company located in Paris, France. [RT 2-157.] HTT bought and sold used IBM AS400 processor and feature cards. [RT 2-155.] The charges in the case were based on three transactions in which Fusion purchased processor cards from HTT. Defendant Mark Robinson testified at trial that during conversations he had with Pecqueraux, Pecqueraux said that he wanted to avoid payment of French value-added taxes on the sale of imported computer cards to Fusion. [RT 9-102.] These taxes were about 50 percent of the total value. [RT 2-178.]

Pecqueraux, with petitioner Robinson's participation, arranged to import the cards through another company, CSC. [RT 2-164-166.] The documentation would reflect a sale of the cards from HTT to CSC and a later sale from CSC to Fusion. [RT 2-178.] The invoices for the cards imported reflected a price that was far lower than the actual contract price. [RT 2-178.] They showed transactions between HTT and CSC. The real transactions, however, were between HTT and Fusion.

Pecqueraux testified that the transactions involving the invoices were done for him to avoid payment of tax in France, and for Mr. Robinson to avoid the payment of U.S. Customs duties. [RT 2-

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3 RT refers to the reporter's transcript of the district court proceedings. The first digit refers to the volume number of the transcript; the following numbers are page references.

164.][4] In his defense, Mr. Robinson testified that he understood the purpose of the understated invoices to be to aid Pecqueraux in avoiding the French tax; he had agreed to conduct the transactions with Pecqueraux in this way to get the cards. [RT 9-102.] With respect to his own part, however, Mr. Robinson believed that there was no United States duty owed on any of the computer cards. [RT 8-112.] He gained this understanding from discussions with U.S. Customs office in San Ysidro, California, with the U.S. Department of Commerce and with a Customs specialist. [RT 8-112.] Mr. Robinson also consulted the Uniform Harmonized Tariff Schedule which he had obtained from U.S. Customs in San Ysidro, California. [RT 8-120.] The Uniform Harmonized Tariff Schedule provides that units such as the ones in this case, which are suitable for physical incorporation into an automatic data processing machine or units thereof, are duty-free. [RT 8-123.] Mr. Robinson understood from this document that no duty was owing on the computer parts in this case. [RT 8-123.] Mr. Robinson testified that the reason for the transactions was to insure that Pecqueraux could be paid offshore without payment of Pecqueraux's part of French taxes, but that there was no design to evade U.S. Customs duty because the computer parts were duty-free and legally admissible into the United States. [RT 9-103, 118, 120.]

The prosecution presented no rebuttal evidence to attempt to refute Mr. Robinson's testimony that the processor boards were duty-free. Nor was there ever any claim by the government that the computer boards were not properly permitted to be imported into the United States. The defense theory was that petitioner Robinson had indeed participated in the filing of false invoices which were ultimately submitted to Customs, but that he did so without any intent to avoid the payment of U.S. Customs duties, or to secure the entry into the country of forbidden items.

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4 Pecqueraux testified as a prosecution witness and received a sentence of probation. For a conviction of conduct substantially the same as Pecqueraux's, petitioner Robinson was sentenced to 121 months in custody.

Mr. Robinson requested that the district court charge the jury in accordance with the rule as set forth in *United States v. Menon*, 24 F.3d 550 (3rd Cir. 1994). He requested the trial court to define "intent to defraud" as an intent to deprive the United States of money or property; and to instruct that in order to convict, the jury must find that he intended to deprive the United States of revenue. [ECR 64, 66; RT 11-12, 13.] Petitioner proposed a second instruction that if defendant honestly believed that no customs duty was owed on the goods, he was not guilty because he did not have the intent to defraud the United States of revenue as required by § 545. [ECR 65; RT 11-12, 13.] The trial court refused these requested instructions. It instructed the jury that intent to defraud means an intent "to deceive or to cheat," [ECR 177] and that in order for the government to prove the charges as set forth in Counts Two, Three and Four, it was required to prove only that the defendant knowingly and willfully made out or passed a materially false, forged, or fraudulent invoice or other document in connection with the importation of IBM computer cards with the intent to defraud (i.e. to "deceive or to cheat") the United States. [ECR 161.] This instruction permitted a conviction of the charged §545 violations upon proof of the knowing submission of the false invoices, in the absence of a jury finding of intent to deprive the government of revenue, money or property of any kind.

REASONS FOR GRANTING THE WRIT

I.

THERE EXISTS A CONFLICT OF CIRCUIT COURT AUTHORITY

This Court should grant certiorari to resolve the split of circuit court authority and to clarify that 18 U.S.C. 545 requires that the prosecution to prove an intent to deprive the government of revenue. In this case, the Ninth Circuit Court of Appeals adopted the rule as set forth in the holdings of two other circuit court decisions. In *United Stated v. Kufess*, 426 F.2d 1017 (7th Cir. 1970), the Seventh Circuit held

that the government need not prove that the items introduced in the United States were subject to duty in order to prove a violation of the statute. In *United States v. Borello*, 766 F.2d 46 (2nd Cir. 1985), the Second Circuit held that the current version of § 545 does not require a showing that the defendant had an intent to defraud the revenue of the United States. By contrast, the Third Circuit, in *United States v. Menon*, 24 F.3d 550 (3rd Cir. 1994), in a comprehensive and well-reasoned decision, held that the term "intent to defraud" in § 545 means an intent to deprive the government of revenue. Thus, the prosecution must prove an intent to defraud the government of revenue in order to convict.

In an opinion by Judge Becker, the Third Circuit set forth its reasoning:.

> While the meaning of "defraud the United States" generally extends beyond defrauding the government of revenue, the history of § 545 demonstrates that Congress did not intend such a broad reading here. We first note that until recently, the Supreme Court generally interpreted "defraud" to extend to actions preventing the government from carrying out its lawful functions even when the government did not lose any revenue. This interpretation took root in *Hammerschmidt v. United States* which analyzed the statutory predecessor of 18 U.S.C. §371, a statute making it illegal to "conspire to ... defraud the United States in any manner or for any purpose." *See* 265 U.S. 182, 185, 44 S. Ct. 511, 68, L.Ed. 968 (1924) (interpreting Comp. St. §10201). In *Hammerschmidt*, the Supreme Court concluded that
>
> > [t]o conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or

> trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.

Id. at 188, 44 S.Ct. at 512.

Recently, however, the Supreme Court has significantly narrowed the category of statutes in which the meaning of "defraud" extends beyond a deprivation of property rights. In *McNally v. United States*, 483 U.S. 350, 359, 107 S.Ct. 2875, 2881, 97 L.Ed.2d 292 (1987), the Court interpreted the mail fraud statute, which made it illegal "to defraud" or to "obtain" [] money by means of false or fraudulent pretenses," to require a finding that the defendant intended to deprive others of property or money. 18 U.S.C.§ 1341. In so doing, the Court rejected "a long line of court of appeals decisions that had interpreted that statute as proscribing schemes by government officials to defraud citizens of their *intangible* rights to honest and impartial government." *United States v. Asher*, 854 F.2d 1483, 1488 (3d Cir. 1988) (emphasis in original). In justifying its decision, the Court quoted *Hammerschmidt*, 265 U.S. at 188, 44 S.Ct. at 512, for the proposition that, "the words to defraud 'commonly refer to wronging one in his property rights by dishonest methods or schemes.'" *McNally*, 483 U.S. at 359, 107 S.Ct. At 2881. The Court concluded that this common understanding combined with the rule of lenity meant that the mail fraud statute

required an intent to deprive someone of money or property. *See Id.*

The Court distinguished the actual ruling of *Hammerschmidt* on the basis that the mail fraud statute aimed to prevent fraud against any member of the public, while the statute discussed in *Hammerschmidt* aimed to protect the *United States* against fraud. A statute that has for its " 'object the protection and welfare of the government alone'" aims to prevent fraud in a broader sense than deprivation of property rights, but a statute aiming to prevent fraud against members of the public is likely using fraud in its usual, narrower sense. *Id.* at 358, 107 S.Ct. At 2881 n. 8 (quoting *Curley v. United States*, 130 F.1, 7 (1st Cir.1904)).

Another case distinguishing *Hammerschmidt* is *United States v. Cohn*, 270 U.S. 339, 343, 46 S. Ct. 251, 252, 70 L.Ed. 616 (1926). There the Supreme Court was faced with interpreting the meaning of Section 35 of the Penal Code, 40 Stat. 1015 (1918), which provided that action "for the purpose of obtaining or aiding to obtain the payment or approval of any 'claim upon or against the United States ... for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States' ... shall be punishable." The Court construed Section 35 as requiring the defendant to cheat the government out of property or money. The Court distinguished *Hammerschmidt* on the grounds that the term defraud within Section 35 "is used in connection within the words 'cheating or swindling,' indicating that it is to be construed in the manner in which those words are ordinarily used, as relating to the fraudulent causing of

pecuniary or property loss." *Id.* at 346-47, 46 S.Ct. at 253.

The message we derive from this potpourri of Supreme Court cases is twofold. First, the meaning of "defraud" must be interpreted in the context of the particular statute that uses the term. In each case in which the Court has evaluated the meaning of "defraud," it has determined the intent of Congress based on the purpose of the particular statute and on the surrounding statutory language. Second, an intent to defraud generally requires an intent to deprive someone of property or money but does not generally require such an intent in the context of statutes making it illegal to defraud "*the United States.*" It seems appropriate therefore to construe Section 545 as prohibiting acts that prevent the United States from carrying out its statutory duties unless there is countervailing evidence on the meaning of the statute.

Here, strong countervailing evidence exists. Menon points out that § 1593 of title 19 (U.S.C. 1940 ed.), the predecessor statute to 18 U.S.C. § 545, required that the defendant intended "to defraud the revenues of the United States" (emphasis added). Although Congress left out the language "the revenues" when it recodified the Federal Criminal Code in 1948, Menon contends that Congress made it clear that it did not not intend to make any substantive change in the statute by making this deletion. Thus, he concludes that the concept "defraud the revenues" is still a part of the statute.

As support for his view that Congress intended no substantive change, Menon cites the House Report which states that, "[r]evision [of the Criminal Code], as

distinguished from codification, mean[s] the substitution of plain language for awkward terms, reconciliation of conflicting laws, omission of superseded sections and consolidation of similar provisions." H.R.Rep No. 304, 80th Cong., 1st Sess. (1947), *reprinted* in 18 U.S.C. A. 439, 440. The House Report does not indicate that substantive changes were included as part of the revision. *See Id.* The House Report concludes that, "[t]he reviser's notes are keyed to sections of this bill and explain in detail every change made in text," *id.* at 448, and W.W. Barron, chief reviser of the code, testified to the House Committee on Revision of the Laws that "*[e]very* substantive change, no matter how minor, is fully explained [in the reviser's notes]." *Id.* at 460 (emphasis added). Because the reviser's notes for §545 say only that "[c]hanges were made in phraseology," H. R. Rep. No. 304, 80th Cong., 1st Sess. at A46, and do not specify that any substantive changes were intended, Menon concludes that the current statute, like its predecessor, requires that the defendant have intended to deprive the United States of revenues to which it was entitled.

[2] We agree. Although we might ordinarily discount legislative history, we are unwilling to do so where that history consists of committee reports and statements by the chief reviser and where the statutory change we are interpreting occurred in the context of codification of the entire criminal code. In that context, Congress was unlikely to have been able to carefully consider every change made to prior statutes. We think it was reasonable for Congress to rely on representations made to it by the chief reviser, among others, that all substantive changes were explicitly set forth in the revisers' notes and for Congress to indicate that it intended no other substantive changes. Absent a compelling need, we should not read as substantive a

> change initiated by the revisers and probably not considered by Congress.
>
> [3] At a minimum, we think that the legislative history makes the meaning of "defraud the United States" in § 545 ambiguous given that, as we have seen, the meaning of defraud varies from statute to statute. As the Court did in *McNally*, we rely on the rule of lenity to hold that because the meaning of defraud is ambiguous in the context of § 545, that section requires an intent to cause a deprivation of property or money.

Menon, 24 F.3d at 555-557.

The comprehensive, well-reasoned analysis of *Menon* contrasts with the conclusory holdings in *Kurfess, Borello* and the instant case. Petitioner requests that this Court resolve the split in circuit court authority on this issue.

II.

THE DECISION IN THIS CASE CONFLICTS WITH THE *COHN* DECISION OF THIS COURT ON THE IMPORTANT ISSUE OF THE CONSTRUCTION IN FEDERAL STATUTES OF THE PHRASE "INTENT TO DEFRAUD"

This Court's decision in *United States v. Cohn*, 270 U.S. 339 (1926) construed the statutory language "with the intent of cheating and swindling or defrauding the government of the United States, or any department thereof." (emphasis added) The facts of *Cohn* are remarkably akin to those in this case. Cohn submitted false information in connection with the entry of duty-free admissible goods, without an intent to deprive the government of revenue. Cohn had procured customs house brokers to make entry of Phillipine cigars by making false and fraudulent statements to the brokers, and through

them as his innocent agents, to the collector of customs. He induced the customs collector to deliver possession of the cigars, which the collector would have refused had he known that Cohn had not properly paid for them. Since the cigars were admissible into the United States and were free of duty, this Court held that Cohn's fraudulent actions were not proscribed by the statute, § 35 of the Penal Code, since Cohn did not intend to defraud the government of money or property, and had made no claim against the government. This Court, dealing with a statute similar in language to the one in this case, and discussing an importation of duty free goods by a fraudulent representation, held:

> "Neither is the wrongful obtaining of possession of such non-dutiable merchandise a "defrauding" of the Government within the meaning of the statute. It is contended by the United States that, by analogy to the decision in *Haas v. Henkel*, 216 U.S. 462, 479, and *Hammerschmidt v. United States*, 265 U.S. 182, 188, and other cases involving the construction of § 37 of the Penal Code relating to conspiracies to defraud the United States, the word "defrauding" in the present statute should be construed as being used not merely in its primary sense of cheating the Government out of property or money, but also in the secondary sense of interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means. The language of the two statutes is, however, so essentially different as to destroy the weight of the supposed analogy. Section 37, by its specific terms, extends broadly to every conspiracy "to defraud the United States in any manner and for any purpose," with no words of limitation whatsoever, and no limitation that can be implied from the context. Section 35, on the

> other hand, has no words extending the meaning of the word "defrauding" beyond its usual and primary sense.

Cohn, 270 U.S. at 346-47.

Cohn makes it clear that the term "defraud," even with respect to a statute that forbids defrauding the government, is a term whose definition depends upon the purpose and language of the statute. The statute in this case, 18 U.S.C. 545, by its text and history relates to government revenue, and is closer to the statute in *Cohn* which requires intent to deprive the government of money or property, than that of *Hammerschmidt*, which would forbid any obstruction of a governmental function by deceit.

The decision of the Ninth Circuit in this case conflicts with the careful delineation in *Cohn* between statutes protecting the government in its property rights and statutes protecting the government in its governmental functions. By its decision in this case the Ninth Circuit, in effect, construes "intent to defraud" to require only intent to obstruct government functions. Such a blanket rule ignores this Court's careful delineation in its jurisprudence in which the meaning depends upon the language and function of the particular statute forbidding "intent to defraud" the government.

III.

THE HISTORY AND ENACTMENT OF THE STATUTE, RULES OF STATUTORY CONSTRUCTION AND THE EXISTENCE OF AN OVERALL STATUTORY SCHEME SUPPORT THE GRANTING OF THE PETITION

The Ninth Circuit view of the meaning of "intent to defraud" in this statute is wrong. The Third Circuit *Menon* decision embodies

the better reasoned result. This is so because of: (1), the history of the statute and its predecessor; (2), the manner in which the current statutory language came about; (3), important rules of statutory construction; (4), the existence of other Customs statutes which serve to penalize deceitful conduct without the necessity of distorting the meaning of § 545 in order to punish such conduct; and (5), the existence of a statutory scheme of which §545 is a part, which provides for different penalties depending upon whether or not the offender intended to deprive the government of revenue.

A. The Statute And Its Predecessors.

The predecessor versions of § 545 showed that the statute was designed and historically acted to protect the revenues of the government. Section 19 of the Tariff Act of 1842 provided in relevant part as follows:

> "And be it further enacted that if any person shall knowingly and willfully, with intent to defraud the revenues of the United States, smuggle and clandestinely introduce into the United States any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out, or pass, or attempt to pass, through the Customhouse any false, forged, or fraudulent invoice, every such person, his, her or their aiders and abettors shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5,000 or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court. Tariff Act of 1842, Chapter 270, Section 19, 5 Stat. 548, 565. (emphasis added)

Section 593 of the Tariff Act of 1930 provided in relevant part as follows:

> Smuggling and clandestine importation (a) Fraud on the Revenue-If any person knowingly and willfully, with intent to defraud the revenues of the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes or attempts to pass, through the Customhouse any false, forged, or fraudulent invoice, or other document or paper, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5,000 or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court. Tariff Act of 1930, Chapter 497, Section 593, 46 Stat 590, 751. (emphasis added)

Thus the statute involved here historically was designed to protect a property interest of the government its right to revenues from duties on imported goods.

Seen in the context of Title 18, 545 is plainly aimed at preventing and punishing actions aimed at evading the collection of customs duties. Section 545 looks to the duty of the United States Customs Service as a revenue collecting arm of the federal government.

B. The Manner In Which The Current Statute Came About.

In 1948, Congress recodified the Criminal Code of the United States in Title 18 of the United States Code. 62 Stat. 683. It was at this point that the reference to "the revenues" was dropped from the "intent to defraud" clause of § 545. The manner of this change

demonstrates that there was never any intent to change or modify the historical requirement of intent to defraud the government of revenue as an essential element of the crime. Congress's primary purpose in passing this bill was to make the law easier to find and to use by enacting the United States Code into positive law and gathering all criminal statutes in one title. See S.Rep.No. 1620. 80th Cong., 2d Sess. (1948), re-printed in 18 U.S.C.A. 438; H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947), reprinted in 18 U.S.C.A. 439. Congress's other purposes in revising Title 18 were the "substitution of plain language for awkward terms, reconciliation of conflicting laws, omission of superseded sections, and consolidation of similar provisions." House Report 304 18 U.S.C.A. at 440. To accomplish this task, the House Committee on Revision of the Laws employed a staff of experts to prepare the revised version of Title 18. *Id.* at 441. Significantly, the revisers considered "[a]pplicable constructions of the courts." *Id.* at 439. This staff of revisers prepared a detailed set of notes, attached as an appendix to House Report 304, explaining every change in the text of the provisions of Title 18. *Id.* at 448. These notes are the definitive authority for all changes made in the law by this enactment. Senate Report 1620, 18 U.S.C.A. 438.

No substantive changes in the law were intended by the revision bill. House hearings on the bill are replete with statements that the bill was not intended to make any substantive changes in the law. See Hearing Before the House Committee on Revision of the Laws on H.R. 5450, 78th Cong., 2d Sess. (1944) (statement of William W. Barron, Chief Reviser), reprinted in 18 U.S.C.A. 449, 460; Hearing Before Subcommittee No. 1 of the House Judiciary Committee on H.R. 1600 and H.R. 2055, 80th Cong., 1st Sess. (1947) (Statements of Rep. Edward J. Devitt; Rep. Eugene J. Keough; William W. Barron; Charles J. Zinn, Counsel, Committee on Revisions of the Laws), reprinted in 18 U.S.C.A. 474, 477, 479, 482, 498, 515. Both the Chief Reviser, William Barron, and the Chairman of the Committee on Revision of the Laws, Rep. Eugene Keough, testified that the revision avoided substantive changes. *Id.*

One purpose of the bill was to eliminate awkward phraseology and archaic language. Such minor changes in language were made repeatedly throughout the criminal code. In the rare instances where substantive changes in law were intended, these changes were explained in the official revisers' notes. See Hearing before Subcommittee No. 1 of the House Judiciary Committee on H.R. 1600 and H.R. 2055, 80th Cong., 1st Sess. (1947) (statement of Charles J. Zinn), 18 U.S.C.A. 515. Mr. Zinn, counsel to the Committee on Revision of the Laws, noted at a committee hearing that "a mere change of wording will not effect a change in meaning unless a clear intent to change the meaning is evidenced . . . . It is clearly indicated in each of those revisers' notes whether any change was intended . . . . " *Id.* The revisers' notes for § 545 do not reflect that any substantive change was intended in § 545 by the deletion of the words "the revenues of" from the phrase "with intent to defraud the revenues of the United States." House Report 304 at A46. The notes say only that "[c]hanges were made in phraseology." *Id.* It is clear that the revisers intended only to correct the awkward construction of § 545. See *United States v. Kushner*, 135 F.2d 668, at 671 (2nd Cir. 1943), (calling the "intent to defraud the revenues" clause "a hardly grammatical expression"). Congress evidenced no intent to change the substantive law of § 545 when it altered the language of the "intent to defraud" provision. Indeed, the clear import of the statute's history is that Congress intended to leave the meaning of § 545 exactly as it had been previously interpreted.

C. Important Rules Of Statutory Construction Require That "Intent To Defraud" Be Given Its Separate And Independent Meaning In Construing The Statute.

1. Every clause should be given meaning.

When interpreting statutes, courts should follow the cardinal rule that effect shall be given to every clause and part of a statute. *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). This Court has spoken of the presumption that each term in a criminal statute

carries meaning. *Bailey v. United States*, 516 U.S. 137 (1995). In this case, if the term "intent to defraud" is intended to mean merely "intent to deceive" the government, as the trial court instructed the jury, it adds nothing to the other language in § 545 which forbids knowingly making out or passing, or attempting to pass through the customshouse any false, forged or fraudulent invoice. If one knowingly attempts to pass a false, forged or fraudulent invoice, by definition one has acted to defraud (i.e. "to deceive") the government within the meaning of the trial court's instructions. If the government's proposed reading of the statute is correct therefore, the term "intent to defraud" is surplusage, because the knowing submission of false documents is inherently deceptive. Thus, in order to give meaning to each clause and part of the statute, one must read "intent to defraud" as requiring something more than merely deceiving the government by the knowing submission of a false invoice. That something more, as indicated by the history and text of the statute, is the intent to deprive the government of its revenues.

2. The Rule of Lenity

To prevent governmental overreaching, criminal statutes are to be construed narrowly, *McNally*, 483 U.S. at 359-60. As the Court held in *McNally*, when there are two rational readings of a criminal statute, one harsher than the other, the court is to choose the harsher "only when Congress has spoken in clear and definitive language." *Id.; Rewis v. United States*, 401 U.S. 808, 812, (1971). Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. In determining whether "intent to defraud" should be construed broadly as a generalized "intent to deceive" or more narrowly as a specific intent to deprive the government of revenue, the Court should use the narrower and more specific reading of the statute.

D. Other Statutes Protect U.S. Customs From False Information And Are Specifically Designed To Do So.

A review of related laws make it quite clear that Petitioner's proposed construction of the statute will neither harm the government's ability to protect itself from false information, nor deprive the government of the ability to prosecute any false statement in a customs declaration, whether or not it has an effect on the revenue.

18 U.S.C. 542, in relevant part, provides as follows:

> Entry of goods by means of false statements. Whoever enters or introduces or attempts to enter or introduce into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties. . . shall be fined for each offense under this title or imprisoned for not more than two years or both. (emphasis added)

Section 542 penalizes the submission of false invoices or documents without respect to revenue loss.

The government can also prosecute the submission of false invoices without proof of an intent to deprive the government of revenue under 18 U.S.C. 1001, which forbids the making of "any false, fictitious or any fraudulent statement or representation", or the

making or use of "any false writing or document knowing the same to contain any false, fictitious or any fraudulent statement or entry." In *Brogan v. United States*, 118 S.Ct. 805 (1998), this Court gave full scope to the language of § 1001, overruling cases which had established an "exculpatory no" exception to the broad language of the statute. See *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978) regarding the use of § 1001 to prosecute false statements in connection with the attempted importation of merchandise. There exists a myriad of other penal statutes which the government can employ to prosecute false statements and invoices, regardless of any intent to deprive the government of revenue, in both titles 18 and 19 of the United States Code.

E. Section 545 Is Part Of A Statutory Scheme With Increasing Penalties Depending Upon The Intent Of The Violator.

There is a graduated escalation of penalties from that of the two year maximum in § 542 which does not require an intent to defraud the government of revenue, to the greater penalty of five years for the violation of 18 U.S..C. 545, which does contain such an additional requirement. This is a rational increase of penalties in accordance with a greater and more serious mens rea. Congress rationally imposed an increasing scheme of punishments in its passage of a related set of statutes, one of which has elements which would penalize any submission of a false statement to Customs regardless of the effect on revenue, and the other of which would penalize in a harsher fashion a submission of false documents with the intent to deprive the government of revenue. The existence of §542, which penalizes the submission of false documents without regard to whether the government may be deprived of duties, indicates that the Congress contemplated a clear and rational structure of statutes, with escalating penalties dependent upon the intent of the violator.

The Ninth Circuit rule in this case ignores the overall statutory structure, and penalizes false statements made without intent

to defraud the government of revenue with a five year penalty instead of the two year maximum otherwise applicable and explicitly provided for in § 542. When the statutory scheme is apparent and rational, a court's construction of the statute should take into account the overall design of these related statutes in construing the meaning of any one section or statute. See e.g. *Block v. Community Nutrition Institute* 467 U.S. 340, 351 (1984); *United States v. Fausto* 484 U.S. 439, 452 (1998); *Welsh v. United States* 398 U.S. 333, 365-366 (1970); *Maislin Industries v. Primary Steel* 497 U.S. 116, 131 (1990). The Ninth Circuit's construction of § 545, permitting punishment for a false submission whether or not there is an intent to deprive the government of revenue, results in § 545 being merely duplicative of § 542, which permits punishment "whether or not the United States shall or may be deprived of any lawful duties." The construction of § 545 in this case does violence to the reasonable and calibrated congressional plan to punish more severely what Petitioner urges is the greater mens rea of § 545, the intent to deprive the government of revenue.

Sections 542 and 545 were codified in their present order on June 25, 1948. Section 542 makes illegal the introduction of merchandise by means, *inter alia*, of any fraudulent or false invoice, declaration, affidavit, letter, paper or statement regarding any material matter, "whether or not the United States shall or may be deprived of any lawful duties." Section 545 penalizes the submission of "false, forged or fraudulent invoices" with intent to defraud the United States. The difference in language and penalty is not merely fortuitous. Section 542 prohibits false submissions regardless of loss of duty; § 545 penalizes the same conduct with a higher penalty, but only if there is proven an "intent to defraud" the United States, i.e. to deprive it of revenue. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States* 118 S. Ct. 285, 290 (1997) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)) The only coherent construction with § 542 in conjunction of § 545 is

to read § 545 as *Menon* reads it: to require proof of intent to defraud the government of revenue.

CONCLUSION

The construction of § 545 in this case by the Court of Appeals ignores Congress' rational and calibrated statutory scheme, ignores the history and language of the statute, suggests too broadly that every statute forbidding "defrauding" the government can be satisfied merely by an intent to thwart a government function, and makes the requirement of proof of an intent to defraud superfluous. This Court should resolve the split of circuit court authority on this issue, and construe the statute to require proof of an intent to deprive the government of revenue.

For the reasons set forth above, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed June 4, 1998

FOR PUBLICATION UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 96-50573
v.	D.C. No CR-95-00827-JNK
MARK STRAFFORD ROBINSON Defendant-Appellant.	OPINION

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, Chief Judge, Presiding

Argued and Submitted
October 7, 1997—Pasadena, California

Filed June 4, 1998

Before: Harry Pregerson, Dorothy W. Nelson, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

SUMMARY

Criminal Law and Procedure/Criminal Acts

The court of appeals affirmed a judgment of conviction. The court held that the "intent to defraud" element of the federal statute prohibiting the submission of false customs invoices requires the prosecution to prove an intent to deceive or cheat government, not an intent to deprive the government of revenue.

As part of a scheme to smuggle costly computer components into the United States, appellant Mark Robinson and his confederates used false invoices, a Swiss bank account, a shell corporation, and wire transfers to avoid the payment of taxes and customs duties.

Robinson was charged with conspiracy, smuggling, money laundering, engaging in monetary transactions with funds derived from unlawful activity, and mail fraud. Three counts of the indictment alleged violations of 18 U.S.C. § 545, which prohibits the submission of false, forged, or fraudulent invoices.

The district court rejected Robinson's proffered jury instruction that § 545's "intent to defraud" element required the government to prove that Robinson intended to deprive the government of revenue. Instead, the court instructed the jury that the prosecution had to prove an intent to deceive or cheat. Robinson was convicted and appealed, challenging the jury instruction.

[1] The jury instruction that "intent to defraud" means an intent to deceive or cheat was correct. [2] The meaning of "defraud the United States" generally extends beyond defrauding the government of revenue. Section 545 has as its primary object the

protection of governmental interests, and accordingly protects interests extending beyond mere property rights. The intent to defraud element of the statute should be construed as meaning intent to avoid and defeat the United States customs laws, rather that intent to deprive the United States of revenue.

[3] The district court did not err in refusing to instruct the jury that the government was required under § 545 to prove intent to deprive the government of revenue.

COUNSEL

Eugene G. Iredale, San Diego, California, for the defendant-appellant.

William Q. Hayes and Timothy D. Coughlin, Assistant United States Attorneys, San Diego, California, for the plaintiff-appellee.

OPINION

HAWKINS, Circuit Judge:

Mark Robinson appeals his jury conviction and sentence for conspiracy, smuggling goods into the United States, laundering of monetary instruments, engaging in monetary transactions in property derived from specified unlawful activity, and mail fraud in violation of 18 U.S.C. §§ 371, 545, 1956, 1957 and 1341. Robinson's conviction arose out of the international sale and transfer of IBM processor boards. We affirm.

FACTS AND PRIOR PROCEEDINGS

Mark Robinson ("Robinson") and Bradley Hirou ("Hirou") were co-owners of Fusion International Trading, Inc. ("Fusion").

Robinson was president, majority owner, and had final decisionmaking authority on all Fusion financial matters.

In 1990, Hirou contacted Stephen Pecqueraux ("Pecqueraux"), the majority owner of High Tech Trading ("HTT"), a company located in Paris, France that bought and sold used IBM AS-400 processor and feature cards.[1]

After Hirou determined that Fusion would be able to sell HTT's IBM processor cards, Robinson and Pecqueraux agreed that Fusion would purchase three processor cards from HTT. In June 1990, Robinson traveled to Paris where he obtained the three processor cards from Pecqueraux, put them in his suitcase and brought them to San Diego, California without declaring them to United States Customs.

That same month, Fusion bought fourteen additional cards from HTT for approximately $500,000. Robinson again traveled to Paris to obtain the cards from Pecqueraux. Robinson and Pecqueraux hid the fourteen cards in the back of a computer, thereby avoiding the payment of French taxes by Pecqueraux and the payment of United States customs by Robinson.

Robinson and Pecqueraux agreed that Robinson would pay Pecqueraux via a Swiss bank account so that both could avoid paying taxes to their respective countries, and so that Robinson could avoid paying customs duties on the value of the cards. They traveled to Zurich, Switzerland and each set up a foreign corporation to be used in the creation of false invoices.

The next month, Pecqueraux contacted the president of CSC Computer Sales and Leasing, Inc. ("CSC"), a New York

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1 Processor cards determine the processing capability of computers and feature cards perform routine computer functions. Processor cards for AS-400 computers sold for $19,000 to $229,000.

business, and arranged to export the cards from France to the United States by using CSC's import license. CSC acted as the importer of record for the parts sold by HTT to Fusion and also acted as an intermediary by purporting to buy the cards from HTT and then sell them to Fusion, when in fact HTT sold the cards directly to Fusion. HTT sent invoices to CSC understating the value of the computer cards, thereby avoiding duties assessed by United States Customs. No duty was ever charged on any Fusion import on which CSC acted as the importer of record. Moreover, the fourteen IBM cards hidden in the back of a computer were not listed on any invoice presented to the United States Customs.

The fourteen cards were sold by Fusion to Sun Data, an Atlanta, Georgia company, for approximately $623,000. Fusion wired payment for the cards to Pecqueraux's Swiss bank account after receiving payment from Sun Data.

Next, Fusion purchased 43 cards from Pecqueraux for $1,360,000. The invoice between Fusion and CSC listed the sale price at $10,000, and the invoice between HTT and CSC listed the sale price at $9,000. The cards were ultimately sold to Sun Data for $1.6 million. After receiving this payment, Fusion wired its payment for the cards to Pecqueraux's Swiss bank account.

A few months later, Pecqueraux sold 554 additional IBM cards to Fusion; the purchase price was $1.8 million. HTT again created a false invoice for CSC that purported that the 554 cards had been sold to CSC for $27,000. CSC created an invoice representing that CSC sold the cards to Arondol (Robinson and Hirou's foreign company, based in Ireland) for $30,500. Arondol was used to make it appear that money sent to Arondol was for expenses, when in fact the money was transferred to Robinson's and Hirou's account. In this way, Robinson and Hirou evaded taxes. Robinson and Hirou sold 423 additional cards to Sun Data for $2.1 million. They then wire transferred $2.3 million to their

Swiss bank account.

During this time, Robinson and Hirou bought Pecqueraux a Porsche automobile ($72,356) and a home in Rancho Sante Fe, California ($1.3 million) as payment for computer cards. Soon thereafter, the market for AS-400 cards began to decline.

Robinson appeals from his judgment in the district court after his conviction for violating 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 545 (smuggling goods into the United States); 18 U.S.C. § 1956(a)(2)(B)(i) (laundering of monetary instruments); 18 U.S.C. 1957 (engaging in monetary transactions of property derived from specific unlawful activity); and 18 U.S.C. § 1341 (mail fraud).

Robinson argues that the district court erred in refusing to instruct the jury that the "intent to defraud" element of 18 U.S.C. § 545 requires the government to prove an intent to deprive the government of revenue.[2]

ANALYSIS

We review a district court's denial of a defendant's proposed jury instruction on a question of law de novo. *See United States v. Duran*, 59 F.3d 938, 941 (9th Cir. 1995).

- Counts 2, 3, and 4 of the indictment charged Robinson with violating 18 U.S.C. § 545, which prohibits, *inter alia*, the submission of false, forged or fraudulent invoices.[3]

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2 We address the remainder of Robinson's arguments in a Memorandum disposition filed simultaneously with this opinion.

3 The statute punishes:

> Whoever knowingly and willfully, with intent to defraud the United

This offense requires the government to prove that Robinson acted knowingly and willfully with "intent to defraud the United States." The jury was instructed that "intent to defraud" meant an "intent to deceive or cheat."

[1] The jury instruction that "intent to defraud" means an intent to deceive or cheat is correct under this court's holding in *United states v. Boggus*, 411 F.2d 110 (9th Cir. 1969). In *Boggus*, this court states that the "intent to defraud" element of 18 U.S.C. § 545 means an "intent to avoid and defeat the United States Customs laws." *Id.* at 113.

Robinson relies on *United States v. Menon*, 24 F.3d 550 (3rd Cir. 1994), which held that "intent to defraud" means an intent to deprive the government of revenue. The *Menon* court reasoned that because a predecessor statute required that the defendant intended to deprive the government of revenues, and because Congress "did not intend to make any substantive change in the statute by" deleting the reference to revenue, the current statute must also require that the defendant have intended to deprive the government of revenue:

> At minimum, we think that the legislative history makes the meaning of "defraud the United States" in §545 ambiguous given that . . . the meaning of defraud varies from stature to statute. As the [Supreme] Court did in *McNally* [*v. United States*, 483 U.S. 350 (1987)], we rely on the rule of lenity to hold that because the meaning of defraud is

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States, smuggles, or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper . . .

> ambiguous in the context of §545, that section requires an intent to cause a deprivation of money or property.

Id. at 557.

[2] *Menon* acknowledged, however, that "the meaning of 'defraud the United States' generally extends beyond defrauding the government of revenue." *Id.* at 555. The Supreme Court has stated that a statute that has as its " 'object the protection and welfare of the government alone' " aims to protect governmental interests extending beyond property rights, whereas a statute that prevents fraud against the public aims to protect property interests. *McNally*, 483 U.S. at 359 n.8 (quoting *Curley v. United States*, 130 F. 1, 7 (1st Cir. 1904)). The statute at issue, 18 U.S.C. § 545, has as its primary object the protection of governmental interests and accordingly protects governmental interests extending beyond mere property rights. Thus, the intent to defraud element of that statute should be construed as meaning intent to avoid and defeat the United States Customs laws, as construed in *Boggus*, rather than the narrower construction "intent to deprive the United States of revenue."

Our decision is in accord with holdings of two of our sister circuits. As the Seventh Circuit explained in *United States v. Kurfess*, 426 F.2d 1017 (7th Cir. 1970):

> [T]he 1954 amendment to 18 U.S.C. § 545, which deleted the word "revenue" from "intent to defraud the revenue of the United States" indicated that the primary Congressional purpose behind the Act was not to raise revenue but to supervise and regulate the inflow of imported goods. [Thus,] in light of the Act's purpose [, it is] no longer necessary to show that the item or items introduced clandestinely into

> the United States were subject to duty in order to prove a violation of the Act.

Id. at 1019; *see United States v. Borello*, 766 F.2d 46, 51 (2nd Cir. 1985) (rejecting the argument that § 545 should be given the same meaning as earlier versions of the statute, "which required a showing the defendant had the 'intent to defraud the revenue of the United States'"); *United States v. McKee*, 220 F.2d 266, 269 (2nd Cir. 1955) ("[L]oss of revenue need no longer be proven by the government.").

We agree with the Second and Seventh Circuits' conclusion that the deletion of "revenue" in 18 U.S.C. § 545 necessitates reading the statute differently than earlier versions, and that "intent to defraud" in 18 U.S.C. § 545 does not mean "intent to deprive the government of revenue." We therefore reiterate our conclusion in *Boggus* that "intent to defraud" in § 545 means an "intent to avoid or defeat the United States Customs laws."

[3] We conclude that, the district court did not err in refusing to instruct the jury that the government was required to prove intent to deprive the government of revenue under 18 U.S.C. § 545.

AFFIRMED.

APPENDIX B

MEMORANDUM OF THE UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed June 4, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 96-50573
v.	)	D.C. No CR-95-00827-JNK
MARK STRAFFORD ROBINSON Defendant-Appellant.	)	MEMORANDUM****

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, Chief Judge, Presiding

Argued and Submitted
October 7, 1997—Pasadena, California

Before: PREGERSON, D.W. NELSON, and HAWKINS, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Mark Robinson appeals his jury conviction and sentence for conspiracy, smuggling goods into the United States, laundering of monetary instruments, engaging in monetary transactions in property derived from specified unlawful activity, and mail fraud in violation of 18 U.S.C. §§ 371, 545, [ ], 1341, 1956, and 1957. Robinson's conviction arose out of the international sale and transfer of IBM processor boards. We affirm.[1]

I.

Robinson argues that the district court erred in failing to grant a motion of judgment of acquittal on counts 2, 3, and 4 because the government failed to prove that false statements included on invoices sent to United States Customs were material.[2]

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1 We address the remainder of Robinson's arguments in an opinion filed simultaneously with this disposition.

2 Robinson makes a series of additional arguments that merit little discussion.

First, he maintains that the district court erred by refusing to give the requested jury unanimity instruction with respect to counts 8-16. He claims that the evidence and the prosecution's argument created confusion as to what the monetary laundering transactions were designed to conceal and disguise, and that a unanimous jury instruction is required where there is a genuine possibility of juror confusion. Yet Robinson offers no specific argument as to the manner in which "the government's theory shifted throughout both the course of the trial and its own closing argument," nor does he assert a specific argument regarding how this might have led to jury confusion. Therefore, the district court did not err by refusing to give the requested unanimity instruction.

Robinson also argues that the evidence the government used to support "smuggling" in counts 8-40 was not evidence of smuggling, as the government contends, but rather, of false documentation. He appears to argue that the proper word usage in counts 8-40 would have been "violation of § 545" rather than smuggling. The district court was correct in its reasoning that 18 U.S.C. § 545's title - - "Smuggling Goods into the United States" - - supports the conclusion that the usage of the term "smuggling" in counts 8-40 was generic, and can describe any offense in section 545, including false invoicing.

Finally, Robinson argues that he was improperly sentenced on his money laundering counts because the court should have looked to the amount of customs duties that the government alleged was evaded in determining the sentencing range. Robinson offers no legal basis for his assertion that although he was sentenced under the money laundering statutes, 18 U.S.C. §§ 1956 and 1957, the court should look to the amount of customs duties evaded rather than the amount of money laundered. We have previously stated that the district court should look to the value of the funds laundered when determining the

We review a district court's failure to grant a motion of judgment of acquittal under the same standard applied to a challenge of sufficiency of the evidence, see United States v. Mullins, 992 F.2d 1472, 1479 (9th Cir. 1993); there is sufficient evidence to support a conviction if, reviewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, see United States v. Bishop, 959 F.2d 820, 829 (9th Cir. 1992).

The jury was instructed that in order to convict Robinson of violating 18 U.S.C. § 545, they were in part required to find that the defendant "did make out or pass or attempt to make out or pass a materially false, forged, or fraudulent invoice." They were instructed that a statement was material "if it could have influenced [United States Customs'] decisions or actions." [3]

We conclude that a reasonable trier of fact could have found, beyond a reasonable doubt, that the false statements were material. Proof of actual reliance is not required, only that the false statement could have influenced the customhouse's actions. See United States v. Facchini, 832 F.2d 1159, 1162 (9th Cir. 1987) (emphasis added). The government introduced evidence that duty would be owing on the computer cards that were falsely invoiced and that because they were falsely invoiced, less duty was paid than was owed. A reasonable factfinder could conclude that the false statements were material because they could have led United States Customs to charge less duty than would otherwise have been assessed.

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sentencing range. See United States v. Golb, 69 F.3d 1417, 1431 (9th Cir. 1995). Thus, Robinson was properly sentenced.

3 Although this circuit has never defined "material" in the context of 18 U.S.C. § 545, the district court's definition is in accord with the definition of material in the context of other statutes. For the purposes of this disposition only, because neither party contests the definition of material in the jury instructions, we will accept this definition.

II.

Robinson argues that the trial court erred in not granting a judgment of acquittal on counts 5, 6 and 7 because the indictment was insufficient inasmuch as it alleged that the processor boards were imported "contrary to law" and did not identify the specific law that had been violated.

Counts 5, 6 and 7 of the indictment did not specify the statute violated by the importation. The counts referred to merchandise that had been imported and brought into the United States contrary to law "in that such merchandise had not been properly presented for inspection, entered and declared." We reiterated in United States v. Normandeau, 800 F.2d 953 (9th Cir. 1986), that "the phrase 'contrary to law' in section 545 is not complete in itself. It is necessary to look elsewhere to see when importation or bringing in of merchandise is 'contrary to law'." Id. at 958 (citing Olais-Castro v. United States, 416 F.2d 1155, 1158 (9th Cir. 1969)). We also held that an indictment must "be read in its entirety" to ascertain whether an indictment states "the elements of the offense charged with sufficient clarity to apprise a defendant of the charge against him, primarily so that he can defend himself against the charge and plead double jeopardy in appropriate cases." Normandeau, 800 F.2d at 958.

In Normandeau, while the count at issue did not specify the law violated, another count did. Thus, we concluded, the indictment sufficiently informed [the accused] of the nature of the section 545 charges against him so that no prejudice to him could have ensued." Id.

"The key question in these inquiries is whether an error or omission in an indictment worked to the prejudice of the accused. If it did not, a conviction will not be reversed merely because a minor or technical deficiency in the indictment is later discovered." Id.

While the government here failed to cite a specific statute, the failure did not prejudice Robinson because the indictment did specify that Robinson's acts were contrary to law "in that such merchandise had not been properly presented for inspection, entered and declared." Thus, Robinson was adequately informed of the charges against him such that no prejudice occurred.

III.

Robinson argues that the district court erred in failing to grant a motion of judgment of acquittal as to counts 8-40, the money laundering counts,[4] because there cannot be monetary "proceeds" from an 18 U.S.C. § 545 violation unless there was duty owing on the goods or the imported merchandise was contraband.

Title 18 U.S.C. § 545 refers, however, to smuggled merchandise without regard to whether the merchandise may be legally imported into the United States or whether there is duty owing. Title 18 U.S.C. §§ 1956 and 1957 describe the statutes that may serve as a specified unlawful activity, and they expressly allow money laundering violations and offenses involving criminally derived property transactions to be grounded in section 545 offenses. Therefore, the district court's failure to grant the defendant's motion to acquit was proper.

IV.

Robinson's argument that the district court erred in excluding his evidence regarding "the scope of involvement of IBM in the investigation, inducement of witnesses, and prosecution of the case" also fails. He argues that if he had been allowed to examine government witnesses property, he would have been able to demonstrate their bias as a result of the influence of IBM.

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4 Title 18 U.S.C. §§ 1956 and 1957 prohibit the laundering of money constituting the proceeds of any specified unlawful activity.

We review exclusions of evidence and limitations of examinations of witnesses for an abuse of discretion. See United States v. Colbert, 116 F.3d 395, 396 (9th Cir. 1997) (limitations of examinations); United States v. Rewald, 889 F.2d 836, 852 (9th Cir. 1990) (exclusions of evidence). "The trial court does not abuse its discretion as long as the jury receives sufficient information to appraise the biases and motivations of the witnesses." United States v. Manning, 56 F.3d 1188, 1197 (9th Cir. 1995).

The district court was within its discretion in excluding evidence purporting to establish that IBM was controlling the government's case; this finding was supported by Robinson's lack of proof. As for the argument that Robinson should have been allowed to expose the biases of certain witnesses, the district court was within its discretion in limiting their examination, for "the jury receive[d] sufficient information to appraise the biases and motivations of the witnesses." Id. at 1197.

V.

Finally, Robinson argues that venue was not proper in Southern California for the act of passing false invoice through the customshouse in New York. Thus, he argues, the trial court erred in failing to instruct the jury on venue and in failing to grant a judgment of acquittal on counts 2, 3 and 4 for lack of venue.

Counts 2, 3 and 4 charged Robinson with making out and passing, and attempting to make out and pass through the customshouse false invoices in violation of 18 U.S.C. § 545.[5]

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5 Jury Instruction 27 instructed that in order for Robinson to be found guilty of counts 2-4:

> [T]he government must prove each of the following elements beyond a reasonable doubt:
>
> First: the defendant knowingly and willfully, with intent to defraud the United States;

The relevant portion of Section 545 states:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customshouse any false, forged, or fraudulent invoice, or other document or paper . . . Shall be fined . . . or imprisoned not more than five years . .

In United States v. Corona, 34 F.3d 876, 879 (1994), we concluded that to determine for venue purposes where a crime occurred, "we examine the key verbs in the statute defining the criminal offense to find the scope of relevant conduct." In United States v. Angotti, 105 F.3d 539, 544 (9th Cir. 1997), we cautioned that we have never stated "that verbs must be considered to the exclusion of all other factors. Other circuits have rejected the view that verbs are the sole consideration in determining venue."

Whether or not we utilize the "key verb" test, we reach the conclusion that venue was proper in the Southern District of California, for Robinson committed the act of passing false invoices partially in that district.

The crime of passing false invoice was committed in more than one district and thus can be considered a continuous offense. Under 18 U.S.C. § 3237(a), venue is proper where a crime is begun,

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> Second: did make out or pass or attempt to make out or pass a materially false, forged or fraudulent invoice or other document in connection with the importation of IBM computer cards into the United States.

continued, or completed:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed. . . .

In Angotti, we determined in the context of another statute[6] that "the crime of making a false statement is a continuing offense." 105 F.3d at 542. Similarly, making, passing, or attempting to pass a false invoice under 18 U.S.C. § 545 is a continuous crime that can be prosecuted in any district in which the crime is begun, continued, or completed.

We conclude that the district court could have found sufficient evidence to establish venue under 18 U.S.C. § 545. Pecqueraux and Robinson devised an arrangement whereby CSC Computer Sales & Leasing, Inc. ("CSC") would purport to be the buyer of the imported cards, and would in turn "sell" these cards to Robinson's company in San Diego. In fact, the buy-sell transaction was between Pecqueraux's company and Robinson's company; CSC merely acted as an intermediate party. In doing so, CSC relied on the sales amount of the cards that were provided by Pecqueraux and by Robinson. Robinson signed several "sales agreements" in San Diego that misrepresented the price of the cards; these documents were faxed from San Diego to CSC in New York. CSC used the information provided to it by Pecqueraux and Robinson in making out the false invoices that were submitted to United States Customs. Thus, the system of false invoicing was

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6 That statute is 18 U.S.C. § 1014, which punishes the making of false statements for the purpose of influencing the action of a federally insured institution.

partially carried out in San Diego, as Robinson signed false documents there as part of the false invoicing scheme and also orchestrated the passing of the invoices from San Diego.

Therefore, the failure to grant a motion for a judgment of acquittal was proper, and the district court's failure to instruct the jury on venue was not error.

AFFIRMED.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Dated August 31, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 96-50573
v.	)	D.C. No CR-95-00827-JNK
MARK STRAFFORD ROBINSON Defendant-Appellant.	)	(Southern California)
	)	ORDER

Before: PREGERSON, D.W. NELSON, and HAWKINS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has called for a vote to rehear this matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
FEB 19 1999

No. 98-766

In the Supreme Court of the United States

OCTOBER TERM, 1998

MARK STAFFORD ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 545, which punishes one who "knowingly and willfully, with intent to defraud the United States, * * * makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper," requires the government to prove that the defendant intended to deprive the United States of money or property.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 147 F.3d 851. A related opinion of the court of appeals rejecting other contentions raised by petitioner (Pet. App. 10a-18a) is unpublished, but the decision is noted at 152 F.3d 931 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1998. A petition for rehearing was denied on August 31, 1998. Pet. App. 19a. The petition for a writ of certiorari was filed on November 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to smuggle merchandise into the United States through the use of false invoices, to receive the same merchandise, and to engage in money laundering, in violation of 18 U.S.C. 371 (Count 1); three counts of making out and passing through the customhouse false and fraudulent invoices, in violation of 18 U.S.C. 545 (Counts 2-4); three counts of receiving merchandise that had been brought into the United States contrary to law, in violation of 18 U.S.C. 545 (Counts 5-7); nine counts of money laundering, in violation of 18 U.S.C. 1956(a)(2)(B)(i) (Counts 8-16); 24 counts of engaging in monetary transactions in property derived from unlawful activity, in violation of 18 U.S.C. 1957 (Counts 17-40); and three counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 42, 44, and 46). Petitioner was sentenced to 121 months' imprisonment, to be followed by three years of supervised release, and was fined $75,000. He was also ordered to forfeit $1.9 million.

1. In 1990, petitioner and Bradley Hirou were co-owners of Fusion International Trading, Inc. (Fusion). As the president and majority owner of Fusion, petitioner had final decision-making authority over all financial matters. Pet. App. 3a-4a; Gov't C.A. Br. 7.

In the spring of 1990, Hirou contacted Stephen Pecqueraux, the majority owner of High Tech Trading (HTT), a company located in France. HTT bought and sold used IBM AS-400 processor cards and feature cards.[1] After Hirou determined that Fusion could sell

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[1] IBM computers contain at least one processor card and several feature cards. The processor card determines the processing

cards to customers, petitioner and Pecqueraux agreed that Fusion would purchase three processor cards from HTT. In June 1990, petitioner took delivery of the three processor cards in Paris, put them in his suitcase, and brought them to San Diego, California, without declaring them to United States Customs. Pet. App. 4a; Gov't C.A. Br. 8-9.

Later that month, Fusion purchased 14 additional IBM cards from HTT for $500,000. Petitioner again traveled to France, where he and Pecqueraux hid the IBM cards in the back of a computer. Petitioner agreed to pay Pecqueraux through a Swiss bank account in order to avoid paying United States taxes and customs duties and to allow Pecqueraux to avoid paying French taxes. Petitioner and Pecqueraux traveled to Switzerland, where each set up a foreign corporation to be used to create false invoices. Pet. App. 4a; Gov't C.A. Br. 9-11.

In July 1990, Pecqueraux arranged to export IBM cards from France to Fusion in the United States through CSC Computer Sales and Leasing, Inc. (CSC), a New York business that had an import license for the IBM cards. CSC subsequently acted as the importer of record for computer parts sold by HTT to Fusion. To avoid the assessment of customs duties on Fusion's purchases, HTT sent false invoices to CSC that understated the value of the computer parts sold to Fusion. Pet. App. 4a-5a; Gov't C.A. Br. 11-12.

In August 1990, Fusion received the computer in which petitioner and Pecqueraux had hidden the 14

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capability of the computer, and the feature cards perform routine computer functions. At the time, a processor card for AS-400 computers sold for $19,000 to $229,000, depending upon the processing capability of the card. Pet. App. 4a n.1; Gov't C.A. Br. 7-8.

IBM cards. The 14 cards were not listed on any invoice presented by CSC to the United States Customs Service. Fusion sold the cards to Sun Data, a company in Atlanta, Georgia, for $623,000. After receiving payment from Sun Data, Fusion wired its payment to HTT to Pecqueraux's Swiss bank account. Pet. App. 5a; Gov't C.A. Br. 12-13.

Shortly thereafter, Fusion agreed to purchase 43 IBM cards from Pecqueraux for $1.36 million. HTT sent a false invoice to CSC that listed the purchase price of the IBM cards as $9,000, and CSC sent a false invoice to Fusion that listed the purchase price as $10,000. Fusion sold the 43 IBM cards to Sun Data for $1.6 million. After receiving payment from Sun Data, Fusion wired its payment for the cards to Pecqueraux's Swiss bank account. Pet. App. 5a; Gov't C.A. Br. 13-14.

Several months later, Fusion agreed to purchase 554 computer IBM cards from Pecqueraux for $1.8 million. HTT sent a false invoice to CSC that listed the purchase price as $27,000, and CSC created a false invoice showing that it sold the cards to the foreign corporation set up by petitioner for $30,500. Petitioner and Hirou arranged to sell the computer cards to Americomp, but the transaction was not consummated. Petitioner and Hirou then sold 423 IBM computer cards to Sun Data for $2.1 million. They subsequently transferred $2.3 million to their Swiss bank account. Pet. App. 5a-6a; Gov't C.A. Br. 14-17.

During this time, petitioner and Hirou paid $72,356 for a Porsche automobile for Pecqueraux and $1.3 million for a home in Rancho Santa Fe, California, for Pecqueraux. Soon thereafter, the market for IBM AS-400 computer cards declined substantially. Pet. App. 6a; Gov't C.A. Br. 16-17.

2. Counts 2, 3, and 4 of the indictment charged that petitioner, with intent to defraud the United States, made out and passed through the customhouse false and fraudulent invoices, in violation of 18 U.S.C. 545.[2] Petitioner contended that, by using the phrase "intent to defraud the United States," Section 545 punishes only one who intends to deprive the United States of customs revenue. He therefore requested that the district court instruct the jury that, to convict him on Counts 2, 3, and 4 charging violations of Section 545, the jury was required to find that petitioner intended to deprive the United States of revenue. He also requested a jury instruction that the jury was required to find him not guilty on those counts if it found that he honestly believed that no customs duty was owed on the computer cards.[3] The district court refused to give petitioner's requested instructions. Instead, the court instructed the jury that the element of "intent to defraud" required an "intent to deceive or to cheat." Pet. 7; Pet. App. 7a.

3. The court of appeals affirmed. Pet. App. 1a-9a. Following circuit precedent, *United States* v. *Boggus*, 411 F.2d 110 (9th Cir.), cert. denied, 396 U.S. 919 (1969),

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[2] In pertinent part, Section 545 provides:

> Whoever knowingly and willfully, with intent to defraud the United States, * * * makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper * * * [s]hall be fined under this title or imprisoned not more than five years, or both.

[3] At trial, petitioner testified in his own defense that he knew that the false invoices allowed Pecqueraux to avoid French taxes, but he claimed that he did not intend to avoid the payment of U.S. customs duties because he believed that the computer cards were duty-free and legally admissible into the United States. Pet. 6.

the court rejected petitioner's claim that the district court erred in refusing to instruct the jury that the government was required to prove an intent to deprive the government of revenue to obtain a conviction under Section 545. Pet. App. 6a-9a.

The court acknowledged that the Third Circuit had held in *United States* v. *Menon*, 24 F.3d 550 (1994), that "intent to defraud" under Section 545 required an intent to deprive the government of revenue. As the court explained, the *Menon* decision had relied on the fact that the predecessor statute to Section 545 had been construed to required an intent to deprive the government of revenues, and had also held that Congress did not intend any substantive change when it deleted the references to revenue from the statutory text. Pet. App. 7a-8a. The court below also observed, however, that the phrase "defraud the United States" has generally been construed (by this Court among others) to extend beyond defrauding the government of revenue. *Id.* at 8a (citing *McNally* v. *United States*, 483 U.S. 350, 359 n.8 (1987)). It therefore concluded that "the intent to defraud element of [the] statute should be construed as meaning intent to avoid and defeat the United States Customs laws, as construed in *Boggus*, rather than the narrower construction 'intent to deprive the United States of revenue.'" *Ibid.* The court further observed that its decision is in accord with the Second Circuit's decision in *United States* v. *Borello*, 766 F.2d 46 (1985), and the Seventh Circuit's decision in *United States* v. *Kurfess*, 426 F.2d 1017, 1019, cert. denied, 400 U.S. 830 (1970). Pet. App. 8a-9a.

ARGUMENT

Petitioner contends (Pet. 7-24) that the term "intent to defraud" in the first paragraph of 18 U.S.C. 545 requires an intent to deprive the government of money or property, as opposed to an intent to deceive the government (for example, by fraudulently depriving it of useful information in the administration of the customs laws). The court of appeals, consistent with two of the three other circuits that have addressed the issue, correctly rejected that contention. Further, although the Third Circuit has reached a contrary result, it may reconsider its decision in light of this Court's intervening decision in *United States* v. *Wells*, 519 U.S. 482 (1997). The Third Circuit relied heavily on assertions by the 1948 Revisers to the United States Code that they intended no substantive change to Section 545 when they removed a reference to defrauding "the revenue of" the United States in that statute. *Wells* makes clear, however, that such assertions by the Revisers cannot prevail over the plain language of Section 545. Further review is therefore not warranted.

1. The court of appeals correctly held that the element of "intent to defraud the United States" in Section 545 does not require proof of intent to deprive the government of revenue. This Court has consistently interpreted statutes prohibiting an act done with intent "to defraud the United States" not to require an intent to injure the government financially. Thus, the Court has long held in cases arising under 18 U.S.C. 371, which prohibits conspiracies "to defraud the United States," that a showing of intent to cause pecuniary harm to the United States is not required. In *Hammerschmidt* v. *United States*, 265 U.S. 182, 188

(1924), this Court explained that "[t]o conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful functions by deceit, craft or trickery, or at least by means that are dishonest." See also *Dennis* v. *United States*, 384 U.S. 855, 861 (1966); *Haas* v. *Henkel*, 216 U.S. 462, 480 (1910). The most natural reading of Section 545, therefore, is that the prohibited "intent to defraud the United States" may include in intent to obstruct the government's enforcement of the customs laws (by, for example, depriving the government of information needed to enforce those laws), and is not limited to an intent to deprive the government of customs revenue.

McNally v. *United States*, 483 U.S. 350 (1987), does not suggest a different conclusion. In that case, the Court held that mail fraud convictions under 18 U.S.C. 1341 could not be based on the theory that a public official's conduct had deprived citizens of their intangible right to honest and impartial services by their government officials. The Court held (483 U.S. at 356-360) that the right to honest services did not fall within the meaning of "property" as defined in Section 1341.[4] Although the Court held in *McNally* that the mail fraud statute was "limited in scope to the protection of property rights," *id.* at 360, the Court expressly distinguished *Hammerschmidt* and similar cases by noting

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[4] After this Court's decision in *McNally*, Congress enacted 18 U.S.C. 1346, which now provides that, for purposes of the mail fraud and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508.

that, whereas Section 371 "is a statute aimed at protecting the Federal Government alone[,] * * * the mail fraud statute * * * had its origin in the desire to protect individual property rights." *Id.* at 359 n.8. Like Section 371, Section 545 is "a statute aimed at protecting the Federal Government alone[.]" *Ibid.* Consequently, *McNally* has no bearing on the issue presented in this case.

There is likewise no merit in petitioner's argument (Pet. 13-15) that the court of appeals' decision conflicts with *United States* v. *Cohn*, 270 U.S. 339 (1926). That case involved a statute that punished one who "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, * * * shall knowingly and willfully * * * make * * * any false or fraudulent statements or representations." In holding that the statute did not reach false statements made to a customs collector when the purpose of the statements was not to deprive the government of money or property, the Court concluded that because the word "defrauding" was "used in connection with the words 'cheating or swindling,' * * * it is to be construed in the manner in which those words are ordinarily used, as relating to the fraudulent causing of pecuniary or property loss."[5] *Id.* at 346-347. The Court distinguished its interpretation of Section 371 (which does not refer to "cheating or swindling") in *Hammerschmidt* on the ground that "the language of the two

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[5] Congress subsequently amended the statute construed in *Cohn* to remove "the restriction to cases involving pecuniary or property loss to the government." *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941); see also *Brogan* v. *United States*, 118 S. Ct. 805, 813-814 (1998); *United States* v. *Yermian*, 468 U.S. 63, 70-71 (1984).

statutes [was] * * * so essentially different as to destroy the weight of the supposed analogy [to Section 371]." *Id.* at 346. Because the language of the false statement statute involved in *Cohn* is likewise "essentially different" from the language of Section 545, *Cohn* is not controlling in this case.

2. Petitioner argues (Pet. 15-24) that the legislative history of Section 545 and the overall statutory scheme establish that Section 545 requires proof of an intent to deprive the government of revenue. As petitioner notes (Pet. 16-17), before the 1948 revision of the United States Code, the predecessor to what is now Section 545 required proof of an "intent to defraud the revenue of the United States." See 19 U.S.C. 1593 (1940). Moreover, the Second Circuit construed that predecessor statute to require proof of an intent to cause "an actual loss of government income." *United States* v. *Kushner*, 135 F.2d 668, 671, cert. denied, 320 U.S. 212 (1943). When Congress revised the Code in 1948, see Act of June 25, 1948, ch. 645, 62 Stat. 683, it deleted the words "the revenue of" from the intent element of Section 545. Petitioner argues, however (Pet. 17-19), that the Reviser's Note to Section 545 and the legislative history concerning the 1948 codification indicate that no substantive change to Section 545 was intended by that revision.

Petitioner's argument is without merit. First, regardless of what the revisers might have said about their intent in proposing changes to the language of Section 545, their comments cannot prevail over the plain language of Section 545, which contains no reference to a requirement of an intent to deprive the government of revenues, but rather uses language—"intent to defraud the United States"—that has long been construed not to be limited to an intent to cause

the government financial harm. See pp. 7-8, *supra*. "Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but in the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (internal quotations and citations omitted); see also *Salinas* v. *United States*, 522 U.S. 52, 57-58 (1997). Here, the statutory language unambiguously reaches further than an intent to deprive the United States of revenue. The fact that the 1948 Reviser's Note did not expressly indicate that substantive changes were intended in Section 545 does not make the statutory language used by Congress ambiguous. In a similar case involving the effect of a Reviser's Note accompanying the 1948 revisions of the United States Code, this Court recently explained that the mere fact that the 1948 Revisers may have overlooked or chosen to say nothing about a substantive change in their proposed revisions does not, by itself, mean that no such substantive change was effected when the revisions were enacted into law by Congress. See *Wells*, 519 U.S. at 496-497.

Moreover, in this case, like *Wells*, Congress could not reasonably have understood the 1948 revision as making no substantive change. Cf. *Wells*, 519 U.S. at 497. When the Second Circuit construed the predecessor to Section 545 in *Kushner*, it placed significant weight on the fact that the statute before it did not flatly punish actions taken with the "intent to defraud" the government, but rather required "an intent to defraud *the revenue of* the United States." 135 F.2d at 671 (emphasis added). Although the *Kushner* court found the reach of the statute "not free from doubt,"

ibid., it concluded that the additional reference to "the revenue of" the United States distinguished the case before it from cases like *Haas* v. *Henkel*, *supra*, which construed statutory language referring to a purpose "to defraud the United States" to reach broadly to an intent to prevent the government from exercising its lawful functions (rather than merely an intent to cause it financial harm, see *Kushner*, 135 F.2d at 671). Indeed, the *Kushner* court affirmed one of the defendant's convictions, which rested on another part of the statute that prohibited "fraudulently or knowingly" importing matter into the United States contrary to law, and did not require a purpose to defraud "the revenue of the United States," *id.* at 672. Moreover, the *Kushner* court endorsed (*id.* at 671- 672) Judge Augustus Hand's decision in *United States* v. *Twenty-Five Pictures*, 260 F. 851 (S.D.N.Y. 1919), which had also relied on *Haas* v. *Henkel* to conclude (*id.* at 854) that "[t]o deprive the United States of the information it was entitled to * * * was to defraud the United States."

The law before the 1948 revisions to the United States Code therefore made clear that the predecessor statute to Section 545 required an intent to deprive the government of revenues *only* because the statute contained an express reference to such revenues, and did not refer generally to an intent "to defraud the United States." When Congress in 1948 deleted the words that the Second Circuit had found crucial, it could not reasonably have believed that that deletion would have no substantive effect. Rather, the deletion did have the substantive effect of removing any requirement that the government prove that the defendant had a purpose to deprive the government of revenue.

For similar reasons, petitioner's reliance on the rule of lenity (Pet. 20) is misplaced. "The mere possibility of articulating a narrower construction [of a statute] does not by itself make the rule of lenity applicable." *Smith* v. *United States*, 508 U.S. 223, 239 (1993). Further, the rule of lenity is "not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of [a statute], * * * such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (internal quotation marks and citations omitted); see also *Muscarello* v. *United States*, 118 S. Ct. 1911, 1919 (1998); *Welis*, 519 U.S. at 499; *United States* v. *Shabani*, 513 U.S. 10, 17 (1994). Because the language of Section 545 is not ambiguous, the rule of lenity is inapplicable in this case.

3. As petitioner points out (Pet. 7-13), two of the other three circuits that have addressed the question have agreed with the Ninth Circuit that Section 545 requires proof only of an intent to avoid and defeat the customs laws, and not proof of an intent to deprive the government of revenue. See *United States* v. *Borello*, 766 F.2d 46, 51-52 (2d Cir. 1985); *United States* v. *McKee*, 220 F.2d 266, 269 (2d Cir. 1955); *United States* v. *Kurfess*, 426 F.2d 1017, 1019 (7th Cir.), cert. denied, 400 U.S. 830 (1970); see also *United States* v. *Mehrmanesh*, 689 F.2d 822, 833 (9th Cir. 1982); *United States* v. *Boggus*, 411 F.2d 110, 113 (9th Cir.), cert. denied, 396 U.S. 919 (1969). On the other hand, the Third Circuit held in *United States* v. *Menon*, 24 F.3d 550, 557 (1994), that Section 545 "requires an intent to cause a deprivation of property or money." The Third Circuit relied on the Reviser's Note accompanying the 1948 revision to Section 545, which indicated that no

substantive change had been intended by the deletion of the words "the revenue of" from the statute. That legislative history, the court concluded, made "the meaning of 'defraud the United States' in § 545 ambiguous given that * * * the meaning of defraud varies from statute to statute." *Ibid.*

For the reasons discussed above, the Third Circuit's view that Section 545 requires proof of an intent to deprive the government of revenue is incorrect. The Reviser's Note to Section 545 simply will not bear the weight that the Third Circuit placed on it. Moreover, after the Third Circuit's *Menon* decision, this Court made clear in *United States* v. *Wells*, *supra*, that a Reviser's Note to the 1948 Code, indicating that no substantive change was intended by an alteration in statutory language, cannot prevail over the plain language of a statute enacted by Congress in 1948 as part of that revision. When presented with the opportunity, the Third Circuit may well reconsider its ruling in *Menon* in light of this Court's decision in *Wells*. In addition, the conflict among the circuits does not at present appear to involve an issue of great importance in the administration of federal criminal law, for only a handful of cases have addressed the issue in the 51 years since the codification of the criminal code in 1948. Accordingly, further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARK STAFFORD ROBINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The government's brief in opposition urges the Court to decline to resolve the circuit court conflict in this case. The government has divined that the Third Circuit may reconsider its decision in light of this Court's decision in *United States v. Wells,* 519 U.S. 482 (1997). (Opp. 7) The government argues that intent to defraud the United States should be read universally to include obstruction of a government function. (Opp. 7) It argues that despite the Reviser's representation to contrary, the deletion of the term "the revenues" from § 545 evidenced a Congressional intent to change the substantive meaning of the statute from one which forbade acts designed to deprive the government of duties, to all acts which somehow would obstruct any governmental function. (Opp. 7) The government is wrong in each of these contentions.

Although *Wells* made clear that in the case of 18 U.S.C. § 1014, the amalgamation of thirteen prior provisions into one new statute, ten of which had no previous express materiality provision and three of which lost the provision in the course of the consolidation, resulted in a statute which had no materiality requirement; *Wells* does not repudiate this Court's established jurisprudence that the Reviser's Notes are critical in interpreting the 1948 Criminal Code language. The government's arguments suggest one additional reason for this Court to grant certiorari: to clarify that *Wells* does not impugn more than a score of cases in which the Court has used the Reviser's Notes from the 1948 Criminal Code Revision or the parallel Judicial Code Revision as the authoritative source to interpret the meaning of statutes.

This Court detailed the history of the 1948 revisions in *Muniz, et al. v. Hoffman, Regional Director, N.L.R.B.,* 422 U.S. 545 (1975):

> The Court's analysis in *Fourco Glass Co. v. Transmirra Corp.* 353 U.S. 222 (1957), is particularly relevant to our inquiry in this case because of the parallel courses followed by the revisions of the Criminal and Judicial Codes. The revision to the Criminal Code was prepared by a staff of experts drawn from various sources and, after this staff completed its work on that revision, the same staff turned its attention to the revision of the Judicial Code. The only hearings held in the House on either of the revisions were held jointly by a subcommittee of the House Committee on the Judiciary.

Hearings on Revision of Titles 18 and 28 of the United States Code, before Subcommittee No. 1 of the House Committee on the Judiciary, 80th Cong., 1st Sess. (1947). The House Reports issued subsequent to those hearings parallel one another in many respects, including almost identical statements respecting the purpose and scope of the two revisions. Compare H.R. Rep. No. 304, 80th Cong., 1st Sess., 2 (1947), quoted in the text, supra, at 469, with H.R. Rep. No. 308, 80th Cong., 1st Sess., 2 (1947):

Revision, as distinguished from codification, required the substitution of plain language for awkward terms, reconciliation of conflicting laws, repeal of superseded sections, and consolidation of related provisions.

The Senate Reports on the two revisions likewise expressed the intention of preserving the original meaning of the statutes undergoing revision. Compare S. Rep. No. 1620, 80th Cong., 2d Sess., 1 (1948), quoted in the text, supra, at 469, with S. Rep. No. 1559, 80th Cong., 2d Sess., 2 (1948) ("great care had been exercised to make no changes in the existing law which would not meet with substantially unanimous approval"). Testimony in the House joint hearings confirms that the methods and intent of the revisers themselves were the same with respect to both revisions. Hearings, supra, at 6.

Muniz, 422 U.S. at 471, n.10.

Muniz further detailed the effect of the 1948 Revisions:

This point was clearly made by the law Revision Counsel to the House subcommittee which held joint hearings on the revisions to the Judicial and Criminal Codes:

> There is one thing that I would like to point out . . . and that is the rule of statutory construction.
>
> In the work of revision, principally codification, as we have done here, keeping revisions to a

> minimum, I believe that the rule of statutory construction is that a mere change of wording will not effect a change in meaning unless a clear intent to change the meaning is evidenced.
>
> To find out the intent, I think the courts would go to the report of the committee on the bills and these reports are most comprehensive. We have incorporated in them . . . notes to each section of the bills, both the criminal code and the judicial code.
>
> It is clearly indicated in each of those revisers' notes whether any change was intended so that merely because we have changed the language — we have changed the language to get a uniform style, to avoid awkward expression, to state a thing more concisely and succinctly — but a mere change in language will not be interpreted as an intent to change the law unless there is some other clear evidence of an intent to change the law.

Hearings on Revision of Titles 18 and 28 of the United States Code before Subcommittee No.1 of the House Committee on the Judiciary, 80th Cong., 1st Sess., 40 (1947)

> This statement is particularly persuasive in view of the fact that its maker, Mr. Zinn, had served as Counsel to the Committee on Revision of the Laws for the previous eight years. The House Report on the revision of the Criminal Code pointed out that Mr. Zinn had, for that Committee, "exercised close and constant supervision" over the work of the revisers who prepared the revision. H.R. Rep No. 304, 80th Cong., 1st Sess., 3 (1947). The nature of the revision process itself requires the courts, including this Court, to give particular force to

> the many express disavowals in the House and Senate Reports of any intent to effect substantive changes in the law.

Muniz, 422 U.S. at 472 n.11.

The *Muniz* Court went on to note:

> To read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that revision is insupportable. As this Court said in *United States v. Ryder*, 110 U.S. 729, 740 (1884): "It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed."
>
> "[N]o changes of law or policy," the Court said, "are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." 353 U.S., at 227. Furthermore, a change in the language of a statute itself was not enough to establish an intent to effect a substantive change, for "every change made in the text is explained in detail in the Revisers' Notes," id., at 226, and the Notes failed to express any substantive change. The Court relied on the Senate and House Reports on the 1948 revision to support this position, id., at 226 nn. 6 and 7; the language quoted by the Court from the House Report is virtually identical to that which appears in the House Report of the 1948 revision of the Criminal Code, see n.9, supra. In view of the express disavowals in the House and Senate Reports on the revisions of both the Criminal Code, see supra, at 468-469, and the Judicial Code, see n.10, supra, it would seem difficult at best to argue that a change in the substantive law could nevertheless be effected by a change in the language of a statute without any indication in the Reviser's Note of that change.

Muniz, 422 U.S. at 471-472.

In *Wingo v. Wedding*, 418 U.S. 461 (1974), the Court noted in relevant part:

> Had any substantive change in the meaning of Rev. Stat. §761, as construed in Holiday v. Johnson, been intended, the Revisers' Notes would have called attention to the change. William W. Barron, the Chief Reviser of the Code, explained: "[No] changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes in clearly expressed. Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.

Wingo, 418 U.S. at 469.

In *Tidewater Oil Co. v. United States, et al.*, 409 U.S. 151 (1971), the Court also addressed the issue:

> However, the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification. Consequently, a well-established principle governing the interpretation of provisions altered in the 1948 revision is that "no change is to be presumed unless clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957).

Tidewater, 409 U.S. at 162-163.

Time and again the Court has looked to the Reviser's Notes as the authoritative source to interpret the meaning of statutes. *See Goldstein v. Cox*, 396 U.S. 471, 477-78 (1970); *Alyeska Pipeline Service Co. v. Wilderness Society, et al.*, 421 U.S. 240, 256-57 (1975); *United States v. National City Lines, Inc., et al.*, 337 U.S. 78, 81-82 (1949); *Stainback v. MonHock Ke Lok Po*, 336 U.S. 368, 376 n.12 (1949); *United States v. John, et al.*, 437 U.S. 634, 648 (1978); *Keene Corporation v. United States*, 508 U.S. 200, 209 (1993); *Newman Green, Inc. v. Alonzo-Larrain*, 490 U.S. 826, 831 n.4. (1989); *Ladner v. United States*, 358 U.S. 169, 177 n.4 (1958); *United States v. Sisson*, 399 U.S. 267, 292 (1970);

Aberdeen and Rockfish Railroad Co., et al. v. SCRAP, et al., 422 U.S. 289, 309 (1975); *McCleskey v. Zant*, 499 U.S. 467, 484 (1991); *Western Pacific Railroad Corp., et al. v. Western Pacific Railroad Co., et al.*, 345 U.S. 247, 255-256 (1953); *Amalgamated Clothing Workers of America, et al. v. Richman Brothers Co.*, 348 U.S. 511, 515 (1955); *United States v. John Hancock Mutual Life Insurance Co.*, 364 U.S. 301, 308-309 (1960); *Finley v. United States*, 409 U.S. 151, 162 (1972); *United States v. Yellow Cab*, 340 U.S. 543, 548 (1951).

In this case, as in *Affronti v. United States*

> The Reviser's Notes were used by Congress as a full explanation of all changes made in the text to existing law. It is unlikely therefore that Congress intended the phrase as it appears in the present section to have a different meaning than the phrase had prior to the revision.

Affronti v. United States, 350 U.S. 79, 82 (1955).

The government brief errs in its argument that "intent to defraud" invariably includes mere obstruction of a governmental function wherever a statute refers to a defrauding of the United States. As the *Cohn* case makes clear such a blanket assertion is not correct. *United States v. Cohn*, 270 U.S. 339 (1926). The holding in *Hammerschmidt*, upon which the government relies so heavily, was interpreting a very broad statute which prohibited defrauding the United States in any manner or for any purpose. *Hammerschmidt v. United States*, 265 U.S. 182 (1924). The breadth of the language of the statute justified the extensive reading *Hammerschmidt* gave to the term "defraud". The history and language of the statute in *Cohn*, however, led this Court to construe "defraud" in that statute in its common law sense requiring the government to prove an intent to deprive of money or property. The precise meaning of "intent to defraud" varies depending upon the text, purpose and history of the particular statute. The absolutist position of the government can find no justification in this Court's precedents.

The Court has construed the predecessor statute of § 545 as uniformly requiring proof of an intent to defraud the government of revenue. In *Dunbar v. United States*, the Court upheld an indictment

under the statute: "An intent to defraud the revenues implies an intent to deprive such revenues of something that is lawfully due them and there can be no such intent without knowledge of the fact that the something is due." *Dunbar v. United States*, 156 U.S. 185, 194 (1895). The indictment in the case carried the direct averment that the defendant "knew that the duties were not fully paid and that he was seeking to bring such goods into the United States without their just contribution to the revenues." *Id.* *Dunbar* noted that the purpose of the statute was the protection of the "revenues of the Untied States" *Id.* In *Keck v. United States*, the Court, in construing the same predecessor statute, held that the smuggling or clandestine introduction of goods referred to in the statute must be without paying or accounting for the duty. *Keck v. United States*, 172 U.S. 434, 445 (1899).

Indeed, this Court has decided a case which appears to have assumed, without explicitly holding, that § 545 requires proof of an intent to cheat the government of duties. In *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972), this Court held that:

> For the Government to secure a conviction under §545 it must prove the physical act of unlawful importation as well as a knowing and willful intent to defraud the United States. An acquittal on the criminal charge may have involved a finding that the physical act was not done with the requisite intent. Indeed the court that tried the criminal charge specifically found that the government had failed to establish intent.

One Lot Emerald, 409 U.S. 232, 233-34. The Court's opinion then quoted the district judge's findings which reasoned that a knowingly false declaration without the intent to deprive the government of revenue was not a violation of the statute:

> The judge at the criminal trial specifically stated:
>
> He is obviously a sophisticated dealer in emeralds and other jewelry.
>
> I don't condone nor do I approve, for one minute what he did in this instance. I think he knew that the jewelry — that ring and those emeralds, should have been declared.

> He made a declaration of some cigarettes and some whiskey, several other little odd, meager items there, but I am not persuaded beyond a reasonable doubt that he did what he did with the intent to defraud the United States.

One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. at 235, n.4.

The government contends that intent to defraud may properly be defined as "an intent to deceive the government (for example, by fraudulently depriving it of useful information in the administration of the customs laws)." (Opp. 7) This Court's decision in *United States v. Yermian*, 468 U.S. 63 (1984) refutes that argument. In discussing the amendments to § 1001, the court cited *United States v. Goodwin*, 566 F.2d 975, 976 (CA5 1978): "Intent to deceive and intent to defraud are not synonymous. Deceive is to cause to believe the false or to mislead. Defraud is to deprive of some right, interest or property by deceit." 468 U.S. 63, 73 n.12. The *Yermian* decision noted:

> The dissent suggests that when Congress eliminated the phrase "with intent to defraud the United States" it really meant only to eliminate the word "defraud" but to retain the element of intent with respect to the United States. See post at 81-82. If that had been the intention of Congress, it simply would have replaced the word "defraud" with the word "deceive" and retained the express intent requirement.

United States v. Yermian, 468 U.S. 63, 73, n.13 (1984).

The government fails to address critical points supporting petitioner's reading of § 545. This Court has held there is a presumption that each term in a criminal statute carries meaning. *Bailey v. United States*, 516 U.S. 137, 145 (1995); *United States v. Wells*, 519 U.S. 482, 495, n.14 (1997). Yet if "intent to defraud" means only "intent to deceive" as argued by the government, it adds nothing to the language of § 545, which prohibits knowingly and willfully making or passing false, forged or fraudulent invoices or other documents. One cannot knowingly pass a false document without intending to deceive. The government's reading of the statute makes the requirement of acting with intent to defraud mere surplusage.

The government ignores the existence of a myriad of other statutes designed to protect its legitimate interest in acquiring information useful in the administration of the customs laws. 18 U.S.C. § 1001, 18 U.S.C. § 542, as well as a score of provisions in Title 19 prohibit the making of false statements in the importation of goods, regardless of any effect on revenue or intent to deprive the government of revenue. It is not necessary to distort the meaning of § 545 to prosecute those who deceive the government in importing goods.

The government fails to address the effect of 18 U.S.C. § 542, which was enacted simultaneously with § 545, and which prohibits the submission of false documents or false statements of any kind, "whether or not the United States shall or may be deprived of any lawful duties." The government's reading of § 545, which could permit a conviction upon the submission of false documents regardless of any intent to cause a deprivation of lawful duties, makes § 542 superfluous. Petitioner submits that § 542 should be construed *in pari materia* with § 545; that they are part of a comprehensive statutory scheme; that they rationally were intended to punish false statements with graduated penalties according to the *mens rea* involved in the particular offense. Section 542 penalizes false statements regardless of whether the government shall or may be deprived of any lawful duties, with a two year maximum. Section 545 penalizes the submission of false statements with intent to defraud, *i.e.* to deprive the government of duties, with a five year maximum. Petitioner construes the statutes in accordance with this Court's rule that

> where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Bates v. United States, 522 U.S. 23, 28 (1997).

The issue in this case has resulted in decisions by four of the circuits. The statute involved was used to prosecute 539 defendants in federal courts from 1995 through 1997 (Bureau of Justice Statistics, Federal Justice Statistics Program). The issue is a recurring one involving a widely used statute. It should be resolved by this Court.

CONCLUSION

For these reasons, as well as those stated in the petition, the writ of certiorari should be granted.

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